

# Chemical Sector Coordinating Council

May 13, 2010

Todd M. Keil  
Assistant Secretary  
Office of Infrastructure Protection  
National Protection and Programs Directorate  
Department of Homeland Security  
Washington, DC 20528

American Coatings Association

American Chemistry Council

American Petroleum Institute

Agricultural Retailers Association

Chemical Producers & Distributors  
Association

The Chlorine Institute

CropLife America

Compressed Gas Association

The Fertilizer Institute

International Institute of Ammonia  
Refrigeration

International Liquid Terminals  
Association

Institute of Makers of Explosives

National Association of Chemical  
Distributors

National Petrochemical &  
Refiners Association

Society of Chemical Manufacturers and  
Affiliates

Re: Docket No. DHS-2009-0026—Chemical Facility Anti-Terrorism  
Standards Personnel Surety Program Information Collection  
Request

Dear Mr. Keil:

On behalf of the Chemical Sector Coordinating Council (CSCC)<sup>1</sup>, I am writing to provide comments on the Department of Homeland Security (DHS)'s proposed Chemical Facility Anti-Terrorism Standards (CFATS) Personnel Surety Program (PSP) Information Collection Request (ICR) (75 Fed. Reg. 18850, April 13, 2010).

CSCC members have a vital interest in having successful personnel surety programs at our facilities and are committed to implementing solutions that both comply with DHS requirements and are workable for private sector owner/operators. CSCC members already follow a series of voluntary practices, guidelines and standards to ensure that only qualified and trustworthy personnel are hired to work at chemical facilities. We support a robust and comprehensive approach to screening potential and current employees and contractors that work at our facilities – regardless of whether those facilities are deemed “high risk” under the CFATS program. However, we have serious concerns about the approach proposed by the DHS to gather information on affected individuals. As discussed below, we believe the proposed PSP:

- Is inconsistent with the CFATS statute because it is not a performance standard;

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<sup>1</sup> The mission of the CSCC is to advance the physical and cyber security and emergency preparedness of the nation's chemical sector infrastructure. Membership in the CSCC is open to any industry association predominantly representing chemical sector businesses. The CSCC manages its activities consistent with Homeland Security Presidential Directive 7 and related authorities.

- Is an expansion of the Interim Final Rule that requires rulemaking;
- Is unnecessary to that extent, duplicative of existing credentialing systems, and will create significant burdens on facilities; and
- Requires analysis under E.O. 12866 and statutes that protect small businesses.

Below we present a detailed discussion of these issues. We urge DHS to implement the PSP in a way that remains within the scope of Interim Final Rule. We look forward to working with you to help facilitate that process.

## **1. PSP Conflicts with the Congressional Mandate that DHS Implement Performance Standards**

Since each chemical facility faces different security challenges, Congress explicitly directed DHS to issue regulations "establishing risk-based performance standards for security chemical facilities."<sup>2</sup> Performance standards are particularly appropriate in a security context because they provide the extraordinary diversity of CFATS facilities with flexibility to address their equally diverse and unique security challenges. Using performance standards rather than prescriptive standards also helps to increase the overall security of the sector by varying the security practices used by different chemical facilities. Security measures that differ from facility to facility mean that each presents a new and unique problem for an adversary to solve.

The Office of Management and Budget (OMB)'s Circular A-119 (Feb. 10, 1998) explains that performance standards "state requirements in terms of required result with criteria for verifying compliance but without stating the methods for achieving required results." DHS cited this OMB Circular in the proposed CFATS rules<sup>3</sup> and in its *Risk-Based Performance Standards Guidance* for CFATS issued in May 2009.<sup>4</sup>

Consistent with Congressional intent and the OMB Guidance, the CFATS interim final rule established RBPS # 12, which requires facilities to "perform appropriate background checks on and ensure appropriate credentials for facility personnel and as appropriate, for unescorted visitors with access to restricted areas or critical assets, including . . . [m]easures designed to identify people with terrorist ties."

Unfortunately, the proposed PSP conflicts with Congress's intent in enacting the CFATS statute, and the OMB Circular, because it takes away a high-risk facility's flexibility to achieve compliance with RBPS-12. The CFATS statute, and RBPS #12, allow a facility to meet its obligations by any method that is "designed to identify people with terrorist ties." The preamble to the interim Final Rule (IFR) clarified that "[t]his . . . standard can be achieved by

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<sup>2</sup> Pub. L. No. 109-295, § 550(a), 6 U.S.C. § 121 note.

<sup>3</sup> See 71 FR 78282-83 (Dec. 28, 2006).

<sup>4</sup> *Risk-Based Performance Standards Guidance, Chemical Facility Anti-Terrorism Standards*, v. 2.4 (Oct. 2008), at 9.

checking against the consolidated Terrorist Screening Database (TSDB).”<sup>5</sup> As a result, therefore, a facility should be deemed to satisfy RBPS #12 by any personnel surety program that entails a TSDB check – for example, a system that requires presentation of a TWIC, HME, NEXUS or FAST credential. Also, while it is essential for DHS to establish a mechanism to enable facilities to run personnel against the TSDB (especially personnel who do not have one of the foregoing credentials), DHS should not impose any obligations on facilities seeking to use that mechanism beyond whatever minimal requirements are needed to ensure that users are legitimate and do not impair its functionality.

The preamble to the IFR stated that, “[t]o minimize redundant background checks of workers, DHS agrees that a person who has successfully undergone a security threat assessment conducted by DHS and is in possession of a valid DHS credential such as a TWIC, HME, NEXUS, or FAST, will not need to undergo additional vetting by DHS.”<sup>6</sup> DHS has no legal authority to now impose more terrorist background checking requirements than were announced in the IFR. Neither the CFATS statute nor RBPS #12 authorize DHS, in the context of the CFATS program, to demand more, or to now question the sufficiency of other federal vetting and credentialing programs for CFATS purposes.

## **2. The PSP Changes the IFR and thus Must Go Through Notice & Comment Rulemaking**

The CSCC is concerned about aspects of the ICR, and statements by DHS staff, indicating that DHS may be retreating from statements in the IFR or adding new requirements upon facilities not contained there. These include:

- DHS’s new plan to conduct “recurrent vetting” of cleared personnel, thus requiring facilities to notify DHS when a person no longer has access to restricted areas or critical assets.
- DHS’s intention to require facilities to submit updates on a DHS-approved schedule whenever an approved person’s “information has changed.”
- The statements in the ICR that DHS is now only “considering recognizing the previous TSDB vetting results completed by other DHS programs.”
- Statements by DHS staff that DHS intends to use the PSP as a way of linking each person screened through it to a particular facility.

The sum effect of these changes is that the PSP is prescribing specific protocols for administering background checks that take a categorically different approach than all other TSDB background check programs currently administered in the United States. They suggest

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<sup>5</sup> 72 Fed. Reg. 17709 (April 9, 2007).

<sup>6</sup> Id.

that DHS does *not* intend to utilize the PSP merely as a mechanism to ensure that individuals who are known to be threats are prohibited from accessing our nation’s critical infrastructure, but rather to leverage private sector resources to track all individuals with access to these facilities, regardless of whether they have been identified as terrorist threats to the homeland.

The IFR is a final regulation, and can only be retracted or expanded by notice and comment rulemaking. Because this transformation of RBPS #12 into a public/private potential terrorist tracking system is inconsistent with the IFR, DHS would have to go through rulemaking to implement it. As DHS staff have publicly recognized, the ICR notices are not proposed rules, and hence do not satisfy that requirement. Therefore, DHS should initiate the public notice and comment process established by the Administrative Procedure Act (APA) if the agency decides to go ahead with these additional provisions. That process would properly alert the public to DHS’s intentions and would obligate DHS to properly respond to all substantive comments.

If DHS does not institute a new rulemaking process, the PSP program will be an illegal or “de facto” rule to the extent that it varies from what was described in the IFR. The APA provides a broad definition of a “rule” as an “agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future”<sup>7</sup> Agency actions such as the PSP can be considered a rule even if not issued as such. Determining whether an agency action is a rule has been the subject of much litigation, and case law provides extensive examples of spurious rules that were invalidated:

- In *DIA Navigation Co., Ltd v. Pomeroy*, 34 F.3d 1255 (3<sup>rd</sup> Cir. 1994), the court concluded that an INS policy, applied in a binding form to carriers and based on an internal legal opinion that required carriers to pay for the detention of stowaways was, in fact, a rule that required notice-and-comment rulemaking due to its binding effect on carriers.
- In *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616 (5<sup>th</sup> Cir. 1994), an unpublished internal paper that the Interior Department applied in a mandatory fashion was held to be a rule that required notice-and-comment rulemaking.

Even if the PSP were viewed as a “new interpretation” of the IFR, that would require notice-and-comment rulemaking:

- In *Shell Offshore Inc. v. Babbitt* , 238 F.3d 622, 629-630 (5<sup>th</sup> Cir. 2001) the court determined that an offshore leasing rate was a “new interpretation” of a regulation governing acceptance of a tariff, which was a “new substantive rule” also subject to notice and comment.

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<sup>7</sup> See 5 U.S.C. § 551(4).

If DHS is determined to proceed with these changes to the IFR, it should explain their necessity and legal authority in a proposed rule. In doing so, DHS will have to comply with E.O. 12866, the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act since, as explained in Section 4 below, the PSP as currently envisioned will itself:

- Cost over \$100 million in a single year and thus be a “major” rule; and
- Have a significant impact on a substantial number of small entities.

Or, as we recommend, DHS should simply drop these changed features and proceed with a simplified PSP designed simply to enable facilities to meet their obligations under RBPS # 12.

### **3. The Proposed PSP Will Impose Reporting Obligations that Are Unnecessary, Redundant and Far More Burdensome than Necessary**

The ICR requests comments on whether the PSP will comply with the Paperwork Reduction Act (PRA), and in particular whether it is necessary, whether it minimizes the burdens associated with it, and whether those burdens have been estimated accurately.<sup>8</sup> As explained below, the PSP does not satisfy the PRA because (i) aspects of it are unnecessary, (ii) it will impose redundant requirements, and (iii) DHS’s estimate of reporting burden is dramatically low.

#### **a. Aspects of the PSP Are Unnecessary**

Section 1 of these comments explains how the PSP exceeds DHS’s statutory authority, because it limits the flexibility that facilities are entitled to under a statute that authorizes only “performance standards,” not prescriptive requirements. To the extent that the PSP goes beyond DHS’s legal authority, it is by definition not “necessary for the proper performance of the functions of the agency.”

#### **b. The PSP Would Lead to Redundant Collection of Information**

Among the individuals that will have access to restricted areas or critical assets at high-risk chemical facilities are those that have already been vetted against the TSDB; received other relevant background checks – identity, criminal history, and citizenship; and, in most cases, received a credential from a federal agency.<sup>9</sup> The proliferation of federal security screening programs has already led to thousands of individuals being subject to more than one screening program. This redundancy is unnecessary and wasteful for the regulated population and the government, and is exactly the sort of thing that the Paperwork Reduction Act was intended to flag and curtail. To its credit, earlier this year the White House issued recommendations to federal agencies to promote comparability and reciprocity of assessments across credentialing

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<sup>8</sup> 75 Fed. Reg. 18856.

<sup>9</sup> Security background checks administered by the Transportation Security Administration, the US Coast Guard, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the Department of Defense, and the like.

and screening programs and to implement the principle of ‘enroll once, use many’ to reuse the information of individuals applying for multiple access privileges.<sup>10</sup> The proposed PSP establishes yet another federal background check program for many of these same individuals, and is at odds with the Administration’s overall effort to harmonize existing federal background check programs.

As noted above, the IFR stated bluntly that, “[t]o minimize redundant background checks of workers, DHS agrees that a person who has successfully undergone a security threat assessment conducted by DHS and is in possession of a valid DHS credential such as TWIC, HME, NEXUS, or FAST, will not need to undergo additional vetting by DHS.”<sup>11</sup> We support this position. However, the PSP dramatically rolls back this clear position, instead saying that:

DHS is *considering recognizing* the previous TSDB vetting results completed by other DHS programs, such as TWIC, and the Trusted Traveler Programs (Secure Electronic Network for Travelers Rapid Inspection (SENTRI), Free and Secure Trade (FAST), and NEXUS). Further, DHS is also *considering recognizing* the results of TSDB vetting (conducted by DHS) upon which each State relies when issuing a Commercial Driver's License with a Hazardous Materials Endorsement (HME).<sup>12</sup>

It is particularly remarkable that, while the Administration is struggling to get different federal agencies to grant reciprocity to each other, DHS is not willing to accept equivalent federal background checks, including those *conducted by itself*, as sufficient for the CFATS standard. Instead, the agency’s proposal requires facilities to “submit the name and credential information for these persons along with the application data for other employees [and directs] facilities ... not [to] allow unescorted access to a critical asset or restricted area to a person in possession of a DHS credential unless information on that person has been submitted [because] *DHS [needs to] determine whether the applicant poses a security threat.*”<sup>13</sup> (Emphasis added.)

According to written testimony provided by David Heyman, DHS Assistant Secretary for Policy, on April 21, 2010 before the Senate Commerce, Science and Transportation Committee, TSA’s security threat assessment for the HME vetting program “covers approximately 3 million drivers authorized to transport hazardous materials.” Heyman also testified that “TSA has conducted a full security threat assessment of, and issued a Transportation Worker Identification Credential (TWIC) to, 1.6 million workers requiring unescorted access to secure areas of port facilities.” HME drivers are already one of the largest groups of TWIC holders. Individuals with these types of credentials must go through a “rigorous vetting program,” as Assistant Secretary Heyman correctly pointed out to Congress. Many of these credentialed workers are either directly employed by a high-risk facility or provide service to these facilities as a contractor or transport carrier delivering or picking up a chemical of interest (COI).

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<sup>10</sup> *Surface Transportation Security Priority Assessment*, White House, March 2010.

<sup>11</sup> Transportation Worker Identification Credential (TWIC), Hazardous Materials Endorsement (HME), Fast and Secure Trade (FAST).

<sup>12</sup> 75 Fed. Reg. 18854 (emphasis added).

<sup>13</sup> 67 FR 17709 (April 9, 2007).

In the case of any high-risk facility that is also licensed or permitted by the ATF to manufacture, import, distribute, or use explosives, the redundancy of the CFATS program will be 100 percent, because all individuals that are authorized to possess explosives, and those empowered to make management decisions or policies, are subject to a background check that is equivalent to TWIC, HME, FAST, or any other DHS vetting programs.<sup>14</sup>

For this ICR to be approved, DHS needs to explain why the “rigorous vetting program” for HMEs, TWICs, and other equivalent vetting programs needs to be duplicated by the CFATS program. We simply see no additional security return. The CSCC cannot imagine any reason, other than DHS’s apparent plan, noted above, to use the PSP to create a new potential terrorist tracking system – something which we also have explained is beyond DHS’s CFATS authority.

c. DHS Has Grossly Underestimates the PSP’s Real Burdens

We believe DHS is significantly underestimating the number of times affected individuals that will be impacted by this proposal, given the large universe of existing credentialed employees and contractors working at high-risk facilities:

- In cases such as an agricultural retail or distribution facility, all employees at some point in a day will likely be in a restricted area or near critical assets. In many cases, such facilities cannot feasibly isolate restricted areas or critical assets to a limited number of employees or visitors.
- DHS’s estimate fails to take into account the additional facilities that may fall under the CFATS program once the “indefinite time extension” issued by DHS on January 9, 2008 is removed for farms, ranches, nurseries and other agricultural operations.
- Many high-risk facilities in the retail segment of the economy during peak times of the year could see a large number of visitors (i.e. customers) coming onto the facility. Depending on how DHS defines “unescorted visitor,” and given the existing population of 5,333 finally or preliminarily tiered facilities, the number of affected individuals could be an order of magnitude greater than the 354,400 figure estimated by the agency

The CSCC also believes that DHS does not fully recognize the background checking consequences that will flow from the certain fact that many individuals, such as truck drivers or project contractors, will require ongoing access to facilities.

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<sup>14</sup> Contrary to the statement in the agency’s April 13<sup>th</sup> notice, the ATF vetting program does include a check against the TSDB. The FBI operates the National Instant Criminal Background Check System (NICS) that ATF uses to vet employees. One of the databases that NICS searches is the National Crime Information Center database, which includes the TSDB.

The PSP also fails to take into account the potential for certain Maritime Transportation Security Act (MTSA)-regulated facilities to be subject to CFATS in the future, as the Administration calls for. Currently, there are approximately 3,200 MTSA-regulated facilities. If the current MTSA exemption is eliminated, the number of CFATS-regulated facilities could increase by more than 50% above the existing population. The number of affected individuals might increase even further, based on the relative size of certain marine facilities to their inland counterparts.

The administrative burden that PSP would create for both the public and private sectors is simply enormous. As a standard of comparison – and warning – the Coast Guard’s original estimate of 400,000 people requiring TWICs has already proven to be understated by factor of four. Based on likely populations and multiple facility access requirements, the CSCC estimates that the number of submittals required by PSP would affect upwards of 10 million. DHS estimates that the amount of time for a responsible entity to submit the information on each affected individual into the CSAT portal is 0.59 hours per individual. DHS also clarified that this time burden is limited in scope to those activities listed in 5 CFR § 1320.3(b)(1). CSCC believes this time does not account for investigations, increased liability, privacy accommodations and adverse employment decisions. But even accepting the 0.59 hour estimate and multiplying by a more likely estimate for the number of affected individuals (as described above), the total time burden associated with collecting, verifying, reporting, maintaining and protecting information for each affected individual could exceed 6,000,000 person hours. Based on an average hourly wage of \$20 per hour for an appropriate individual with the proper security level and training, the total cost burden imposed on the regulated community would be \$120 million.

#### **4. DHS Should Comply with E.O. 128866, the RFA and SBREFA**

For the reasons just discussed, the economic impacts of a PSP program could be staggering. This has several consequences.

First, Executive Order 12866 directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector, and to provide a qualitative and quantitative assessment of the anticipated costs and benefits of a Federal mandate resulting in annual expenditures of \$100 million or more. The CSCC believes DHS should treat this attempted expansion of the Interim Final Rule as a significant rulemaking and comply with the Executive Order.

Second, the impacts of the proposed PSP will be especially profound on small businesses. In fact, the CSCC believes the PSP will have a significant economic impact on a substantial number of small entities, which requires DHS to conduct a Regulatory Flexibility Analysis in accordance with the Regulatory Flexibility Act, and to convene a Small Business Regulatory Enforcement Fairness Act panel.

The Regulatory Flexibility Act has two complementary objectives. The first is to ensure that federal agencies follow specific procedures to assess the economic impacts of their regulatory

actions on small entities, and then consider regulatory alternatives that would reduce those impacts. The second, broader objective is to change the culture within federal agencies so that they appreciate the importance of small entities and reflect this appreciation in their regulatory actions. For many years, the RFA, as a tool for regulatory reform, seemed to be doing poorly at both objectives. Agencies either essentially ignored the RFA or conducted perfunctory regulatory flexibility analyses.<sup>15</sup>

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)<sup>16</sup> reinforced the RFA by making agency noncompliance with the RFA judicially reviewable.<sup>17</sup> SBREFA also requires an agency to convene a special review panel consisting of OMB and representatives of affected small entities whenever it has to prepare a regulatory flexibility analysis.<sup>18</sup>

CSCC members appreciate that DHS has voluntarily provided an initial analysis of the PSP's potential impacts on small entities, but this was conducted prior to final tiering. The new cost, time and technical burdens make it clear that the PSP will have a significant impact on a substantial number of small entities. Therefore, DHS should reassess its compliance with a small business analysis should be re-evaluated by DHS.

## Conclusion

CSCC members remain committed to complying with CFATS through the implementation of suitable security measures at our facilities. Furthermore, we openly welcome frank discussions with DHS as to how we achieve this mutual objective. The CSCC strongly urges DHS to consult with it about future program development before such regulatory initiatives are prescribed to help ensure that errors such as those introduced in PSP do not continue in future rulemakings.

CSCC is also concerned that the current ICR notice does not respond to every significant comment filed on the initial ICR. We hope that DHS will fully respond to the significant comments contained here, as well as to others submitted to the docket under current, past and future ICR notices.

Thank you for your consideration of our views and concerns.

Respectfully,



Dan Walters  
Chairman

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<sup>15</sup> Keith W. Holman, *The regulatory flexibility act at 25: Is the law achieving its goal?*, 33 Fordham Urb. L.J. 1119,1132 (2006).

<sup>16</sup> Pub. L. No. 104-121.

<sup>17</sup> 5 U.S.C. § 611

<sup>18</sup> 5 U.S.C. §609(b).